

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KATE SVALDI,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

No. C12-1710RSL

ORDER DENYING MOTION FOR  
ATTORNEY'S FEES

This matter comes before the Court on plaintiff's "Motion for Attorney Fees." Dkt. # 27. The Equal Access to Justice Act ("EAJA") provides that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). In the social security context, the government has the burden of showing that both its underlying benefits decision and its litigation position were "substantially justified" in order to avoid a fee award. Gutierrez v. Barnhart, 274 F.3d 1255, 1258 (9th Cir. 2001); Hardisty v. Astrue, 592 F.3d 1072, 1077 (9th Cir. 2010). "Substantially justified" means having "a reasonable basis both in law and fact" such that a reasonable person would be satisfied. Pierce v. Underwood, 487 U.S. 552, 565 (1988). The key issue is whether the action or inaction which gave rise to the civil litigation is factually and legally reasonable, not whether the overarching benefits decision was

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1 substantially justified. 28 U.S.C. § 2412(d)(2)(D); Meier v. Colvin, 727 F.3d 867, (9th Cir.  
2 2013).

3 Having reviewed the record in this matter and the Report and Recommendation of  
4 the Honorable James P. Donohue, United States Magistrate Judge, the Court finds as follows:

5 In Brewes v. Comm'r of Soc. Sec., 682 F.3d 1157 (9th Cir. 2012), the Ninth  
6 Circuit held that new and material evidence presented for the first time to the Appeals Council is  
7 part of the administrative record and will generally be considered by the federal courts on  
8 review. When that happens, however, the Appeals Council's options are rather limited: it may  
9 (a) review the case if, taking the new evidence into consideration, the Administrative Law  
10 Judge's decision is contrary to the weight of the evidence or (b) decline review. 20 C.F.R.  
11 § 404.970(b). As the Court previously noted, "the line between disabled and not disabled is  
12 razor thin in this case." Dkt. # 22 at 2. The ALJ's findings were supported by substantial  
13 evidence in the record, and the addition of Dr. Agnani's February 2012 opinion did not, in and of  
14 itself, make those findings contrary to the weight of the evidence. Review, therefore, was not an  
15 option under § 404.970(b), and the Appeals Council so found. AR 1.

16 In the circumstances of this case, the stark choice between review and not review  
17 based on the standard set forth in 20 C.F.R. § 404.970(b) meant that new evidence that may have  
18 materially impacted the overall balance of the record and, specifically, the ALJ's interpretation  
19 of Dr. Agnani's December 2010 report, was given short shrift because it was not enough to  
20 establish error outright. The Appeals Council would have been hard-pressed to conclude that  
21 Dr. Agnani's new report was dispositive. It therefore dismissed plaintiff's request for review.  
22 That does not, however, mean that the new evidence was immaterial. Neither the Appeals  
23 Council nor this Court was in a position to determine how Dr. Agnani's February 2012 opinion  
24 would have impacted the ALJ's analysis. The Court, declining to decide this key issue *de novo*,  
25 remanded the matter so that the Commissioner could determine whether the record as  
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1 supplemented warrants a finding of disability. No error can be ascribed to the Appeals Council  
2 for failing to remand to the ALJ, however. Assuming, for purposes of this motion, that the  
3 Appeals Council has the option of remanding the case without first finding that the underlying  
4 decision was contrary to the weight of the evidence, 20 C.F.R. § 404.977(a),<sup>1</sup> the choice of  
5 whether to remand is discretionary, and the failure to do so in this case was not an unreasonable  
6 application of the law or the facts. More fundamentally, the Appeals Council's decision not to  
7 review a case is not subject to judicial review: when that happens "the ALJ's decision becomes  
8 the final decision of the Commissioner and the district court reviews that decision for substantial  
9 evidence, based on the record as a whole." 20 C.F.R. § 404.972; Brewes, 682 F.3d at 1161-62  
10 (internal citations and quotation marks omitted).

11 Unlike the situation in Meier, 727 F.3d 867, and Tobeler v. Colvin, 749 F.3d 830  
12 (9th Cir. 2014), there was substantial evidence in the record supporting the ALJ's finding that  
13 plaintiff was not disabled at the time he made his decision. The addition of Dr. Agnani's  
14 February 2, 2012, opinion raised issues regarding the correctness of the ALJ's interpretation of  
15 Dr. Agnani's prior opinion, however, and was material to the nature and extent of plaintiff's  
16 condition and its impact on her ability to be gainfully employed. The Court opted to remand this  
17 action so that the fact finder who had seen the witnesses and weighed the evidence could  
18 determine whether the new opinion – which in an of itself was not enough to establish error in  
19 the Commissioner's ruling – changed the balance of the evidence before him such that, had it  
20 been timely presented, he would have ruled differently. The ALJ's decision had a reasonable

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22 <sup>1</sup> The way the regulations are structured suggests that the Appeals Council must first determine  
23 that review is appropriate under the standards set forth in 20 C.F.R. § 404.970 before having the option  
24 to remand the matter to the ALJ. The first two regulations after the standard is set forth relate to  
25 dismissals of requests for review (20 C.F.R. § 404.971 and § 404.972), while subsequent regulations  
26 presume that the Appeals Council has agreed to review the case. For purposes of this analysis, the Court  
assumes that § 404.977(a) provides the Appeals Council with a middle option: it can remand to the ALJ  
for additional fact-finding or consideration even if it is unable to conclude that the ALJ's decision was  
contrary to the weight of the evidence.

1 basis in law and fact, regardless of the outcome of the case on remand.

2 In these circumstances, the Court finds that the ALJ's disability determination was  
3 substantially justified, as was the Commissioner's litigation position in this action. Both the  
4 Magistrate Judge and the undersigned concluded that there was substantial evidence in the  
5 record to support the ALJ's findings: the undersigned reversed and remanded the matter solely  
6 because the submission of new evidence before the Appeals Council added data to the record  
7 and corrected an interpretive error on which the ALJ apparently relied to an unknown extent.  
8 Rather than attempt to weigh the new evidence *de novo* or guess how the new evidence would  
9 have impacted the ALJ's analysis, the Court deferred to the Commissioner. Reasonable minds  
10 could – and did – find that the Commissioner's decision to deny benefits and her defense of the  
11 ALJ's decision was justified in law and in fact. Lewis v. Barnhart, 281 F.3d 1081, 1084 (9th  
12 Cir. 2002). The first exception to the award of fees therefore applies. 28 U.S.C.  
13 § 2412(d)(1)(A). The Court also finds that the "special circumstances" exception applies. The  
14 administrative process was effectively stymied by the late submission of evidence that may or  
15 may not have had a material effect on the outcome before the ALJ. Neither the Appeals Council  
16 nor this Court were particularly well-placed to evaluate the effect the new evidence would have  
17 had on the ALJ had it been presented with the rest of the information. Even if the Appeals  
18 Council had the option to remand the matter for further proceedings without granting review, the  
19 decision not to remand is discretionary and is not reviewable. Given that no aspect of the  
20 Commissioner's conduct was unreasonable, that the finding of "not disabled" was and may yet  
21 be supported by substantial evidence, and that it was plaintiff's late submission of evidence  
22 which led to the procedural quandary in which we find ourselves, an award of fees in these  
23 circumstances would be unjust.

1 For all the foregoing reasons, plaintiff's motion for attorney's fees (Dkt. # 27) is  
2 DENIED.

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4 Dated this 14th day of August, 2014.

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6 Robert S. Lasnik

7 United States District Judge  
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